IN THE HIGH COURT OF JUDICATURE AT BOBBY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4637 OF 2004

Shri Kunha Ahmed Imbichahmed ..Applicant.
(Org.Acc.No.1)

V/s.

1. Narcotics Control Bureau,
   Bellard Estate, Mumbai.
2. The State of Maharashtra ..Respondents.

Shri T.U. Ziyad for the Applicant.
Shri D.R. More, APP for Respondent No.2-State.

CORAM : A.M.KHANWILKAR, J.
DATED : DECEMBER 09, 2004

PC :-

. Heard learned counsel for the parties. Perused the record.

2. The learned counsel for the Applicant has raised four points before this court to contend that the Applicant ought to have been released on bail. The first contention is about non-compliance of section 42 of the NDPS Act; the second is regarding non-compliance of section 50; the third is about non-compliance of section 57 and the fourth is of non-compliance of section 67 of the said Act.

3. In the first place, the grievance about the non-compliance of sections 50, 57 and 67 was not made before the court below. There is nothing in the judgment under appeal that such a grievance was made. More over, in the application as filed before this court, no specific ground has been taken. Assuming that some vague ground has been taken that there has been non-compliance of the provisions of NDPS Act, would entitle the Applicant to canvass the above proposition, to my mind, on a close scrutiny of those grounds, there is no substance in any of the submissions made before this court.

4. I shall first deal with the ground of non-compliance of section 42 of the Act. In the present case, the Applicant has been arrested in connection with the alleged offence. There is material on record to indicate that he had visited Bombay on the given date to take delivery of contraband items from Accused No.1, weighing 4 kgs. (heroin), on instructions of one Aris. Indeed, before the Applicant - Accused No.2 was to take delivery of those items from Accused No.1, on a prior information received by the officers of NCB, arrest of Accused No.1 has been caused, who in turn has disclosed about

the role of the Applicant and also identified the Applicant, Accused No.2. Even Applicant Accused No.2, has identified the Accused No.1 and gave in his own hand writing that he had come to take delivery of the contraband items from Accused No.1. On the basis of information disclosed by Accused No.1, arrest of Applicant Accused No.2 was caused. Search of the premises occupied by the Applicant in a hotel was conducted. The grievance of the Applicant is that the search of his premises was carried after the sunset and that could be done only upon complying the requirements under the provisions of section 42 of the Act. In the present case, that has not been done. The court below dealt with this grievance but observed that the premises where search was conducted was a public place for which reason section 43 will come into play and compliance of section 42 was not required. This opinion, assuming is incorrect as is contended by the Applicant by placing reliance on the decision in the case of State of Orissa vs. A. Rajeswar Patra, reported in **2004 Supreme Court Cases (Cri) 1871;** This submission, however, clearly over looks the legal position stated by the Apex Court in **AIR 2003 Supreme Court 4311 (Para-14)** in the case of M. Prabhulal vs. Assistant Director, Directorate of

Revenue Intelligence as well as in **2004 CRI. L.J. 2541 (Para-10)** in the case of State of Haryana vs. Jarnail Singh. In the aforesaid decisions, which are pressed into service by the Respondents, it is observed that where the officer accompanying the raiding party himself is a gazetted officer, in that case it is not necessary for him to record his satisfaction as is provided by sections 42 and 43 of the Act. In the present case it is seen from the record that Shri A.P. Patil, Superintendent was accompanying the raiding party. It cannot be disputed that the Superintendent of NCB, is a gazetted officer. Accordingly applying the ratio of the decisions pressed into service on behalf of the Respondents, the argument regarding non-compliance of section 42 is untenable.

5. That takes me to the grievance regarding non-compliance of section 50 of the Act. It is argued that the Applicant was searched by the raiding party without complying the requirement of disclosing him that he had a right to be searched before the gazetted officer. This argument need not detain us for the simple reason that the material on record indicates that after the applicant was identified, the Applicant

was informed that his person was to be searched and that he had a right under the law, to have his search taken by the gazetted officer or magistrate, but he waived that right and agreed for the search by the raiding party. At this stage, it is not possible to ignore this material on record. In any case, it is not in dispute that no contraband item was recovered from the person of the Applicant during that search. If it is so, assuming that there was no compliance of section 50 that will make no difference to the out come of the trial.

6. The next grievance regarding non- compliance of section 57 of the Act, is that, full report has not been submitted by the concerned officer to the Superior Authority. Even this submission deserves to be only stated to be rejected. The material on record indicates that Shri C.A. Fernandes, I.O. , submitted a full report dated 17th July, 2003 to his superior. The grievance, however, of the applicant is that the report does not mention the fact that brief-case was recovered during the search of the applicant. This argument is repelled by the counsel appearing for the Respondent by relying on the Panchanama, which records the fact of recovery of briefcase during the search in

the premises which was occupied by the applicant. The said panchanama is forwarded alongwith this report. Assuming that there has been non-compliance as complained by the applicant, that does not take the matter any further, because no recovery of the contraband items has been made from the premises occupied by the applicant, which were put to search nor is the case of the prosecution that the said briefcase contained any contraband item.

7. The last argument regarding non-compliance of section 67 of the Act also need not detain us because the Respondent has rightly pressed into service the written statement given by the applicant accused No.2 in his own hand writing. At this stage, it is not possible to doubt the correctness of the said material. Whether the said document is admissible or otherwise, all those issues will have to be considered only at the trial. If the Applicant has given statement in his own hand writing, presumably with full understanding of the situation, it is now too late in the day to complain about non-compliance of section 67 of the Act.

8. As mentioned earlier, there is sufficient

material on record to connect the Applicant with the alleged offence and the co-accused has disclosed the role of the applicant that he was to take delivery of the contraband item weighing about 4 kgs from him and has also identified him. In the circumstances, it is not possible to take a view that there is reason to believe that the Applicant is not guilty of the alleged offence. It follows that in view of the rigours of section 37 of the Act, this application is required to be dismissed. Hence, dismissed. Ordered accordingly.

9. The trial is already pending for more than one and half years. The trial court may consider if the same can be expedited.

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